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Richard H. Nielsen v. Mark O'Reilly, Linda R. French and Metropolitan Property and Liability Insurance Co. : Reply Brief

Utah Supreme Court

Glenn C. Hanni; Barbara Maw; Strong and Hanni; attorneys for respondent.
L. Rich Humpherys, Karra J. Porter; Christensen, Jensen and Powell; attorneys for appellant.

IN THE SUPREME COURT

STATE OF UTAH

RICHARD H. NIELSEN, Plaintiff/Appellant, v. MARK O'REILLY, LINDA R. FRENCH and METROPOLITAN PROPERTY & LIABILITY INSURANCE CO., Defendants/respondents.	Case No. 900489 Priority No. 16

REPLY BRIEF OF APPELLANT

APPEAL FROM A SUMMARY JUDGMENT ENTERED
IN THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY
HONORABLE HOMER F. WILKINSON

L. Rich Humpherys, 1582
Karra J. Porter, 5223
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, Utah 84101
Attorneys for Plaintiff/Appellant

Glenn C. Hanni
Barbara Maw
STRONG & HANNI
6th Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant/Respondent
Metropolitan Property & Liability Insurance Company

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Barbara Maw
STRONG & HANNI
6th Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant/Respondent
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SUMMARY OF ARGUMENT

Nielsen is entitled to two uninsured motorist (UM) coverages under his policy with Metropolitan. The very provision present in the Nielsen policy has been found ambiguous by other courts. Additionally, Richard Nielsen's testimony as to his reasonable expectations of two coverages was uncontroverted in the lower court, and is supported by the case law and commentary. Metropolitan's attempt to refute Nielsen's testimony creates, at best, a factual issue to be decided by a jury.

Nielsen is also entitled to coverage under the $500,000 limit for "each accident." The language in question is vague and fails to define the critical term relied upon by Metropolitan. Furthermore, Metropolitan uses that term to mean different things both in its brief and elsewhere in the policy. Accordingly, the language is ambiguous and must be construed in Nielsen's favor. Metropolitan cannot establish that Nielsen knowingly and voluntarily relinquished his right to claim coverage under the "each accident" limit, and thus Nielsen has not waived his right to make that argument. At the very least, the district court must make specific findings as to whether such a waiver occurred.

Because Metropolitan's obligation to Nielsen is contractual, Nielsen is entitled to pre-judgment interest on the entire amount of the obligation. Metropolitan's attempt to characterize

Nielsen's claim for coverage as a personal injury action is contrary to this Court's own pronouncements that the UM coverage relationship is based upon contract. As with other contract disputes, the fact that Metropolitan disputed the extent of its liability does not preclude imposition of pre-judgment interest.

In the alternative, Nielsen is entitled to pre-judgment interest on the amount of his special damages. Metropolitan's opposition to this point is based upon an unrealistic interpretation of the term "damages" as used in the policy. Furthermore, case law supports the award of pre-judgment interest where an insurance company knows or should know that the insured is entitled to be paid policy limits but refuses to tender that amount. It is at the very least a factual issue. Finally, the award of pre-judgment interest is statutorily mandated, and thus Metropolitan cannot avoid payment through contrary contractual provision.

ARGUMENT

Objection To New Evidence Submitted On Appeal By Respondent

Metropolitan has attached to its brief an affidavit of Metropolitan's counsel, including exhibits, which was not presented in the court below. The affidavit appears for the first time in Metropolitan's brief. Under well-established principles of appellate review, Metropolitan cannot rely upon material never

presented to the district court in attempting to support the lower court's order of summary judgment. Pilcher v. Department of Social Services, 663 P.2d 450, 453 (Utah 1983).

It should also be noted that the new material is offered by Metropolitan to refute the evidence adduced below as to Richard Nielsen's reasonable expectations. Metropolitan's effort is inappropriate for three reasons. First, the district court was required to view the facts and inferences in the light most favorable to Nielsen. Atlas Corp. v. Clovis National Bank, 737 P.2d 225, 229 (Utah 1987). Second, the evidence as to Nielsen's reasonable expectations was uncontroverted in the lower court. Metropolitan was obligated at the trial court to submit countering affidavits or other evidence in response to Nielsen's affidavit. U.R.Civ.P. 56(e). Metropolitan's failure to do so warranted the entry of summary judgment in favor of Nielsen. Third, it would be a dangerous precedent to allow a party in a civil case to submit new evidence on appeal. No judgment below would ever be factually final and all parties would have incentive to bolster their position on appeal with new evidence.

I. THE NIELSEN POLICY HAS TWO LIMITS OF $250,000/500,000 FOR UM COVERAGE.

A. The policy language in question permits stacking.

Metropolitan characterizes the issue in Point I as whether the district court correctly ruled "that stacking of uninsured motorist benefits was not allowed in Utah." The actual issue, however, is whether the language in the particular policy purchased by Richard Nielsen in 1982 permits stacking of the uninsured motorist coverages provided in the policy.

The principle case relied upon by Metropolitan supports the conclusion that the availability of stacking (prior to enactment of the anti-stacking statute in 1985) hinges on the particular policy language at issue. In Martin v. Christensen, 22 Utah 2d 415, 454 P.2d 294 (1969), this Court determined that, under the terms of the particular policy construed, stacking of UM coverages was properly denied:

> There appears to be no ambiguity or uncertainty in the provision just quoted. It being thus set forth as part of the insurance contract, in clear and understandable terms, that where the Company has issued more than one policy to an insured, it will be liable only up to the maximum coverage of its highest limit on any one policy for any one accident or loss, it is the duty of the courts to give it effect.

Id., 454 P.2d at 295.

Contrary to Metropolitan's assertion, Martin does not bar stacking regardless of the policy language. Instead, it is

apparent from the Court's opinion that the availability of stacking depended upon the specific language present in the policy, which, in Martin, the Court found unambiguous.

The anti-stacking provision of Martin expressly applied to "any other insurance policy or policies issued to the insured by the company . . ." Id. at 295. The plaintiff in that case had purchased two separate insurance policies. It is not difficult to see why this Court found no ambiguity.

Metropolitan suggests that the language in the Nielsen policy is "virtually identical" to that in Martin. However, Metropolitan quotes the wrong section of the insurance policy to support this assertion. The provision in Nielsen's policy governing "other insurance" in the uninsured motorist context is found in a section labeled OTHER INSURANCE. (Policy, p. 12). Metropolitan ignores this provision in the UM section, preferring to have this Court construe the "other insurance" provision in the general conditions section. Metropolitan does not refute Nielsen's analysis of the UM provision. As demonstrated below, the clause is ambiguous.

Metropolitan seeks to limit UM coverage based upon what it claims to be other available insurance.[1] The "other insurance"

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[1] The applicable UM provision was quoted and discussed at length in Nielsen's opening brief, but is completely ignored by Metropolitan in its Brief. Metropolitan provides no explanation for why the UM "other insurance" provision is in the policy if the issue is actually supposed to be governed by the general conditions

provision in the UM section has two separate subdivisions, one labeled "Automobile Liability and Automobile Medical Expense Coverages" and the other labeled "Protection Against Uninsured Motorists Coverage." Only the latter section specifically addresses the present case. The first paragraph of this provision states:

> **Protection Against Uninsured Motorist Coverage**
> With respect to **bodily injury** to an **insured** while **occupying** a **highway vehicle** not owned by the **named insured**, the insurance under the Protection Against Uninsured Motorist Coverage shall apply only as excess insurance over any other similar insurance available to such **insured** and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

In this case, the Nielsens were not occupying a vehicle owned by another when the accident occurred. Accordingly, the second paragraph of the provision comes into play:

> Except as provided in the foregoing paragraph, if the **insured** has other similar insurance available to him and applicable to the accident, the **damages** shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance,

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section. Moreover, even if the paragraph cited by Metropolitan did encompass UM coverage within its scope, the policy language expressly governing UM coverage is controlling, as a clarification or modification of the more general provision cited by Metropolitan. United California Bank v. Prudential Insurance Company of America, 681 P.2d 390, 425-26 (Ariz.App. 1983); Waterway Terminals Co. v. P. S. Lord Mechanical Contractors, 406 P.2d 556, 566 (Ore. 1965, en banc); Restatement (Second) of Contracts § 203(c).

> and METROPOLITAN shall not be liable for a greater proportion of any loss to which this Protection Against Uninsured Motorists Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

This "other insurance" provision is quite dissimilar to the applicable provision in Martin. The identical provision has been found ambiguous by other courts, including U. S. District Court Judge Aldon J. Anderson in Ainge v. Allstate Insurance Co., Civ. No. C-80-211A (July 21, 1981). In Ainge, Judge Anderson rejected the construction of Martin advocated by Metropolitan, noting that the language of the policy in the latter case expressly applied to other policies issued "by the Company." In contrast, a policy without such language was ambiguous as to the effect of the additional premiums. (Ainge at 4, R. 387). An ambiguous provision cannot satisfy the requirement that an insurer wishing to limit coverage must do so through "exclusions phrased in language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided." Wagner v. Farmers Insurance Exchange, 786 P.2d 763, 765 (Utah App. 1990).

The Arkansas Supreme Court, also construing an identical provision, reached the same conclusion in Farm Bureau Mutual Insurance Company of Arkansas v. Barnhill, 681 S.W.2d 341 (Ark. 1984). The court held that, unlike an "other insurance" clause

which states it applies to other insurance provided "by the company," an insured could not be expected to realize that "other similar insurance" means "the very policy he is reading." Id. at 342.[2]

Thus, while the Nielsen policy provision governing dual coverages in the UM context has not been construed by a Utah appellate court, the identical provision has been found ambiguous by other courts. As the Court of Appeals has noted, that fact alone suggests the existence of an ambiguity. Metropolitan Property & Liability Co. v. Finlayson, 751 P.2d 254, 257 (Utah App. 1988), vacated as moot, 766 P.2d 437 (Utah App. 1989). At the very least, it cannot be said that such a provision is clear and unmistakable.

The general rule in Utah is that payment of a premium establishes prima facie entitlement to coverage. Peterson v. Western Casualty and Surety Co., 19 Utah 2d 26, 29, 425 P.2d 769, 770 (1967). The language of the Nielsen policy contains nothing to

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[2] The same problem is presented even by the policy language relied upon by Metropolitan. The language says, "With respect to any **occurrence**, accident or **loss** to which this and any other automobile insurance policy issued to the **named insured** by METROPOLITAN also applies, the total limit of METROPOLITAN'S liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy." (Underlined emphasis added). Again, it is not reasonable to argue that "any other policy" means the very policy the insured is reading.

contradict that rule with respect to payment of the second premium. Consequently, Nielsen's motion for summary judgment should have been granted, and the district court erred in entering judgment in favor of Metropolitan.

B. At the very least, the district court's order erroneously disregarded factual issues as to Richard Nielsen's reasonable expectations.

In addition to the ambiguity in the policy, Nielsen argued below that he is entitled to two coverages because of his reasonable expectations in paying two premiums. An insured's reasonable expectations may override even a clear exclusion in the policy. Wagner, at 766. Nielsen filed an affidavit explaining that payment of two premiums created an expectation in him of receiving two coverages. (R. 393-94). This uncontroverted affidavit was before the district court, and created at least a factual issue which the court could not resolve through summary judgment.

Metropolitan now asks this Court to resolve the factual issue as well, arguing in its brief with new evidence that Nielsen did not really have an expectation of two coverages. As noted in the Objection above, Metropolitan's argument is based on inappropriate evidence which is not in the record. Metropolitan did not raise the argument in the lower court and therefore cannot raise it now

for the first time. Bundy v. Century Equipment Co., 692 P.2d 754, 758 (Utah 1984).

Metropolitan's argument concerning Nielsen's reasonable expectations has another basic flaw. Metropolitan cites various documents for the proposition that Nielsen actually believed the limits were only $250,000, but none of the documents arose in a discussion of the insurance company's liability under the policy. These were settlement negotiations and Nielsen knew that Metropolitan would never settle for more than what it considered to be the policy limit of $250,000. The issue was not resolved before the trial. In spite of the Nielsens' serious injuries, Metropolitan had made clear that it did not intend to offer even the $250,000. Consequently, it did not matter whether or when Nielsen raised the issue of the insurance Metropolitan's actual liability under the policy.

It should be noted, however, that Nielsen's uncontroverted testimony as to his reasonable expectations is supported not only by the cases cited, but by an authority in automobile insurance, who explains:

> Since uninsured motorist coverage, unlike liability coverage, is linked to the person rather than an automobile, it is not necessary for uninsured motorist coverage that a motor vehicle insured in the policy be involved in the accident. Coverage is available to an insured while occupying *any* motor vehicle, whether owned or nonowned, insured or uninsured, or while the insured is afoot or on horseback.

> As a result of this type of "portable" coverage, the owner of several vehicles by paying a single premium for coverage applicable to only one of them secures coverage for himself and his family while occupying the uninsured vehicles as well as the insured vehicle. Thus, when he pays separate and uniform premiums for vehicles #2 and #3, he reasonably expects -- and it is a fair inference -- that he has purchased additional coverages coextensive with and supplementing the insurance already available under a single coverage.

Irvin E. Schermer, Automobile Liability Insurance - No-Fault Insurance, Uninsured Motorists, Compulsory Coverage, Clark Boardman, 2nd ed. 1991, Vol. 3, § 31.02[8], p. 31-18.1.[3] (underlined emphasis added). Sufficient evidence therefore exists to support the conclusion that Nielsen's reasonable expectations entitle him to two coverages.

Metropolitan apparently relies upon Martin to argue that an insured cannot have reasonable expectations of two coverages even when two premiums are paid. The issue of separate premiums arose in Martin only in conjunction with arguments that the insurer had waived the limiting provision, and that the financial responsibility laws mandated minimum coverage for each premium. The concept of reasonable expectations was never raised or

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[3] The premium for uninsured motorist coverage for the second vehicle in Nielsen's policy was slightly lower than for the first vehicle. As Schirmer notes, however, "[e]ven the payment of a lesser premium for Vehicles #2 and #3 is not in and of itself significant. This may simply reflect the saving in administrative expense involved in writing one policy rather than several." Id. at p. 31-19.

addressed. In fact, the doctrine was not formally recognized in Utah until more than 20 years later. See Wagner, supra.

Metropolitan also argues that "any lay person" could see that stacking is not allowed under the policy. Metropolitan's assertion is directly refuted by (or insulting to) Judge Anderson and the highest court in another jurisdiction, both of whom found this very policy language ambiguous.

C. Summary.

Metropolitan's argument that stacking was prohibited in toto is not supported by any of this Court's pronouncements. Prior to the anti-stacking statute, the availability of stacking is governed by the language of the specific policy. In this case, the specific provision governing UM coverage has been found ambiguous by at least two other courts. Accordingly, Metropolitan is liable under the policy for two coverages.

Nielsen's entitlement to two coverages is also supported by the uncontroverted evidence of Nielsen's reasonable expectations. In addition to Nielsen's own testimony, other courts and commentators have recognized that an insured's reasonable expectations in paying two premiums for uninsured motorist coverage is to receive two coverages.[4]

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[4] Citing the subsequently enacted anti-stacking statute, Utah Code Ann. § 31A-22-305(6), Metropolitan "assumes" this court "will not take a stance in contravention with [sic] the legislature."

For those reasons, the district court's entry of summary judgment in favor of Metropolitan should be reversed, and the case remanded with instructions to enter judgment entitling Nielsen to two coverages of $250,000/500,000 each.

II. NIELSEN IS ENTITLED TO THE "EACH ACCIDENT" LIMIT OF $500,000 FOR EACH COVERAGE.

Nielsen submits that the "each person/each accident" language in the policy is ambiguous, and Nielsen is therefore entitled to recover under the $500,000 "each accident" limit of coverage. In its brief, Metropolitan criticizes Nielsen for not citing any cases involving identical policy language, but Metropolitan also fails to cite any such cases. Of course, a logical explanation is that most policies are more explicit in explaining the each person/each accident concept. Two such policies are construed in the cases cited by Metropolitan, also discussed in Nielsen's opening brief.

While Metropolitan does not quote the exact language at issue in Allstate Insurance Co. v. Ostenson, 713 P.2d 733 (Wash. 1986), it assures this Court that it is "substantially similar" to that in

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That assertion implies that this Court will not conduct an independent review of the law as it stood when Nielsen's entitlement arose, but will construe the law to comport with the subsequent legislation. That notion is in conflict with the well-established rule that a party has a right to rely upon the substantive law in effect at time a cause of action accrues. Stephens v. Henderson, 741 P.2d 952, 954 (Utah 1987).

the Nielsen policy. However, the policy in Ostenson actually read "subject to this limit for 'each person' . . ." (Emphasis added). Similarly, the policy construed in Standard Accident Insurance Company of Detroit v. Winget, 197 F.2d 97 (9th Cir. 1952) provided: "Subject to the above provision respecting each person . . ."[5] The Nielsen policy neither refers to a "limit" or to "each person" language.

Plainly, the drafters of the policies quoted above knew how to make clear to a reasonable insured just what the per accident limit was "subject to." In this case, however, the policy utilizes a non-specific statement that the each-accident provision is subject to "this provision," but does not define what "this provision" is.

In response to that contention, Metropolitan explains that "provision" is the same thing as "clause." (Metropolitan's Brief, p. 19) (sentence consists of "two separate clauses or provisions"; "two clauses or provisions.") Yet Metropolitan itself uses, both in its brief and in the policy, the word "provision" to express various concepts that are beyond a mere "clause." For example, Metropolitan's brief applies the word "provision" to entire sentences or paragraphs. (See Metropolitan's brief, pp. 7, 16, 18, 20-21, 31-32). In fact, Metropolitan refers to the entire

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[5] In its brief, Metropolitan underscores the words "subject to the above provision," ignoring the following words "respecting each person." (Metropolitan's Brief, p. 21.)

limitation section at issue as the "limiting provision." (Metropolitan's Brief, p. 18.)

The word "provision" also is given several different meanings within the policy itself. For example, pages 2 and 3 of the policy refer to "the provisions of" a financial responsibility law and "the provisions of" any other no-fault law. On page 3, the policy, discussing duplicative policies, refers the reader to "the provisions of the policy providing the highest dollar limit of benefits payable." In that context, Metropolitan apparently meant "provisions" to refer to the entire text of a policy.

In a subsequent section, the policy also makes reference to "the provisions of" premises insurance, worker's compensation or disability benefits law, and personal injury protection benefits, all in the same sentence. (Policy, p. 10). Later in the policy, reference is made to "the provisions of this policy relating to appraisal and time of payment and of bringing suit," again apparently referring to entire sections. (Policy, p. 19). As an additional example, the final paragraph of the policy states that the insured and Metropolitan agreed to be bound "by any award made by the arbitrator(s) pursuant to this provision." (Policy, p. 22). Yet "this provision" follows a seven-clause sentence expressing numerous concepts. Either the term "this provision" refers to the entire preceding arbitration section, or, employing Metropolitan's

theory of parsing, parties are bound only by awards made pursuant to the last thought immediately preceding the term "this provision." Obviously, Metropolitan would not claim that to be its intent.

In light of the inconsistent usage of the word "provision" by Metropolitan itself, it seems unreasonable to expect the average insured to discern what the policy means with respect to "this provision" in the uninsured motorist context. The policy is ambiguous, and should be construed against Metropolitan.

As its secondary position, Metropolitan asserts that Nielsen has waived his right to claim coverage in an amount exceeding $250,000. Support for this proposition consists largely of the Barbara Maw affidavit, which is improperly raised for the first time as an attachment to Metropolitan's brief, and unsupported discussions of what Metropolitan says Nielsen intended. (See Metropolitan's Brief, pp. 24, 26.)

Metropolitan focuses on the assertion that Nielsen had an opportunity to present his claim for full coverage prior to or during the trial and failed to do so. Therefore, Metropolitan claims Nielsen has waived his right to make such arguments. Metropolitan implies that the "trial" was to resolve Metropolitan's liability, which was not the case. The trial was only to decide the personal injury claim against the tort feasors O'Reilly and

French, i.e. the fault of the accident and the amount of Nielsen's damages. The jury was not asked to determine Metropolitan's liability. Metropolitan was not even on the verdict form.

The liability of Metropolitan was decided by the judge after the "trial." All of these issues on appeal were raised and briefed before the trial court ruled on Metropolitan's liability. In fact, it was impossible for the trial judge to even address Metropolitan's liability until after the personal injury trial.

The overriding factor, however, is that Metropolitan has not alleged or established any of the elements of waiver, namely, knowing and voluntary relinquishment of a known right. Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985). Metropolitan offers no reason for why the extent of its policy limits was an issue required to be established before the personal injury trial, particularly when it refused to offer Nielsen even the $250,000 which it claims to be the limit. Furthermore, Metropolitan's own arguments are inconsistent, precluding the company from relying upon Nielsen's alleged inconsistencies to establish waiver.

As a final note, it should be noted that all of the citations by Metropolitan in its waiver argument refer to Nielsen's counsel. Utah law is clear that an attorney cannot waive substantive rights of his client, Mecham v. Benson, 590 P.2d 304, 309 (Utah 1979), and

therefore such comments would not be binding upon Nielsen in any event.

III. NIELSEN IS ENTITLED TO PRE-JUDGMENT INTEREST ON THE AMOUNT DUE UNDER HIS UM COVERAGE.

Nielsen submits that pre-judgment interest should be awarded on the amount due under his contract with Metropolitan, pursuant to Utah Code Ann. § 15-1-1. As in any other contract claim, the fact that Metropolitan contests its liability or the amount due does not relieve the company of paying pre-judgment interest on the amount the court finds owing under the contract.

Metropolitan's sole argument against this point is that Nielsen's claim for insurance proceeds is properly characterized as a personal injury action, rather than contract, and that the amount due was therefore not reasonably calculable prior to trial.

Metropolitan's argument is directly contradicted by this Court's holding in Beck v. Farmers Insurance Exchange, 701 P.2d 795 (Utah 1985). In Beck, this Court held that an insurance company's obligation to its insured for uninsured motorist coverage is grounded in contract, not tort. When this Court decided Beck, it undoubtedly knew that the obligation to pay UM coverage arises out of a personal injury accident, but that fact did not change the Court's view of the relationship between insured and insurer as

based in contract. Metropolitan's obligation to Nielsen is contractual.

Metropolitan attempts to distinguish Beck by arguing that this is not an action against an insurance company; "[n]o suit has been filed against Metropolitan with regard to coverage nor have any claims been made." This argument is difficult to comprehend. All of the issues which this Court is asked to decide in this appeal concern Metropolitan's liability to Nielsen under the insurance contract.

Once the contractual nature of Nielsen's relationship with Metropolitan is acknowledged, Nielsen's entitlement to pre-judgment interest on the sum owing under the contract becomes clear. As Metropolitan itself notes in its brief, insurance contracts are construed the same as other contracts. In other jurisdictions where the relationship between insured and UM insurer is deemed contractual, courts have recognized the obligation of UM carriers to pay pre-judgment interest on the entire amount of their obligation to the insured. See, e.g., Brinkman v. AID Insurance Co., 766 P.2d 1227, 1234-35 (Idaho 1988), and State Farm Automobile Insurance Co. v. Reaves, 292 So.2d 95, 102-03 (Ala. 1974), discussed in Nielsen's opening brief. As the Alabama Supreme Court stated in Reaves:

> Certainly, there may be disagreements between insurer and insured as to how much (or whether any sum) is rightfully

> due, and that disagreement ultimately may have to be settled in a court of law. But such is true of other contract actions as well.

Id. at 103.

Metropolitan does not refute this case law. Instead, Metropolitan argues that the amount owing was not calculable with reasonable mathematical certainty. Unfortunately, that argument is again based upon the erroneous assertion that Nielsen's claim is one for personal injury. Furthermore, it ignores case law cited in Nielsen's opening brief. Those cases hold that an insured is entitled to pre-judgment interest, even in non-contractual situations, where the insurer knew, or should have known, that it would have to pay policy limits to the insured. See, e.g., Shafer v. Automobile Club International Insurance Exchange, 778 S.W.2d 395, 399 (Mo.App. 1989); State Farm Mutual Automobile Insurance Co. v. Bishop, 329 So.2d 670 (Miss. 1976); United Services Automobile Association v. Winbeck, 637 P.2d 996 (Wash.App. 1981).

Metropolitan's response to the principle set forth in such cases is to assert that it disputed the damages and its liability to Nielsen. It does not follow, however, that Metropolitan's refusal to pay under the contract was reasonable or in good faith. While Metropolitan's unreasonableness is a separate ground, not a prerequisite, for recovery of pre-judgment interest on the contract

amount, at the very least this issue is factual which should be resolved by a trier of fact.

In summary, Nielsen is entitled to pre-judgment interest on the entire amount this court finds owing under his contract with Metropolitan. Nielsen's claim for coverage under the policy is grounded in contract, rather than tort, and thus Metropolitan is liable for interest as in any other contract action. Even if the action were considered one for personal injury, a factual issue exists as to whether Metropolitan knew or should have known that Nielsen's damages exceeded policy limits.

IV. IN THE ALTERNATIVE, NIELSEN IS ENTITLED TO PRE-JUDGMENT INTEREST ON THE SPECIAL DAMAGES UNDER UTAH CODE ANN. § 78-27-44.

Nielsen claims, in the alternative, that he is entitled to pre-judgment interest on the amount of his special damages, pursuant to Utah Code Ann. § 78-27-44. Metropolitan argues that its obligation to Nielsen is limited solely to the amount of the policy limits. Metropolitan's argument is based upon the language of the policy, which obligates Metropolitan to pay,

> [A]ll sums which the **insured** or his legal representative shall be legally entitled to recover as **damages** because of bodily injury sustained by the **insured**, caused by accident and arising out of the ownership, maintenance or use of an uninsured highway vehicle . . .

(Policy, p. 7).

Metropolitan contends that the above language relieves it of liability for pre-judgment interest in excess of its policy limits. In support of that position, Metropolitan cites an insurance treatise and some cases in which the word "damages" is construed to include pre-judgment interest.

Metropolitan's argument ignores the fact that under Utah law, insurance contracts are to be construed not in a technical legal sense, but rather in accordance with the understanding of the average, reasonable purchaser of insurance. Draughon v. Cuna Mutual Insurance Co., 771 P.2d 1105 (Utah App. 1989). An ambiguous provision regarding liability for interest must be construed in favor of the insured, 15A Couch on Insurance 2d § 56:11 (1983), and the reasonable expectations of the insured are to be given effect where possible. Wagner v. Farmers Insurance Exchange, 786 P.2d 763 (Utah App. 1990).

Nowhere in the quoted provision of the Nielsen policy is there any language which would lead a reasonable insured to know that the limitation applicable to "damages" includes pre-judgment interest. The insured certainly cannot obtain such an understanding from the definition of "damages" provided in the policy:

> **"damages"** with respect to **bodily injury** includes damages for care and loss of services resulting therefrom, and with respect to **property damage**, damages for loss of use;

(Policy, Definitions for Part 1, p. 4, incorporated by reference into Definitions for Part 3, p. 7.)

Nowhere in that definition, or anywhere else in the policy, is there any reference to pre-judgment interest. It is simply not reasonable to argue that to an average insured, the limitation on the amount Metropolitan would pay for "damages" includes pre-judgment interest. The policy is not clear on what is meant by "damages," and therefore must be construed in favor of Nielsen.

Regardless of the meaning of the term "damages" in the policy, Metropolitan's argument is flawed in two other respects. First, as illustrated by the case law cited above, courts have held that an insurer's obligation for interest is not restricted by the amount of policy limits where the insurer knows, or should know, that the insured is entitled to policy limits, but nonetheless refuses to pay. (See discussion under Point III, page 20.) Whether Metropolitan falls within that category is a factual issue to be determined by a trier of fact.

An additional defect in Metropolitan's argument is the fact that interest on special damages is statutorily mandated. Insurance contracts must be construed in conformity with the law. Utah Code Ann. § 31-19-35 (1983). Consequently, a provision in an insurance policy which conflicts with Utah statutory requirements is void or must be construed in accordance with the law.

Thus, even if Metropolitan's construction of the contract term "damages" were correct, the contract must still provide for the payment of statutorily mandated pre-judgment interest on the contract obligation.

CONCLUSION

For the reasons set forth above and in Nielsen's opening brief, Nielsen respectfully requests the Court to reverse the district court's order of summary judgment, and to remand with instructions to enter judgment in favor of Nielsen or to have factual issues determined by a trier of fact.

DATED this 28th day of May, 1991.

CHRISTENSEN, JENSEN & POWELL, P.C.

L. Rich Humpherys
Karra J. Porter
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of May, 1991, four true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** was mailed, postage prepaid, to:

Glenn C. Hanni
Barbara Maw
STRONG & HANNI
Attorneys for Defendant/Respondent
Metropolitan Property & Liability Insurance Company
6th Floor Boston Building
Salt Lake City, Utah 84111

Karra J. Porter

L. Rich Humpherys
Karra J. Porter
Attorneys for Plaintiff/Appellant